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IN THE HIGH COURT OF DELHI AT NEW DELHI

I.T.A. No. 799/2004

Date of Decision: May 15, 2006

M/S BERGER PAINTS INDIA LTD. ..... Appellant
Through : Mr.P.K. Sahu, Adv.

versus

COMMR. OF INCOME TAX, DELHI-V ..... Respondent
Through : Ms.Prem Lata Bansal,
Mr.Ajay Jha, Advocates

CORAM:
HON'BLE MR. JUSTICE T.S. THAKUR
HON'BLE MR. JUSTICE SHIV NARAYAN DHINGRA

1. Whether reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether the judgment should be reported in the Digest?

T.S. THAKUR, J.

The short question that falls for consideration in this appeal is whether premium collected by the appellant assessee on its subscribed share capital is 'capital employed in the business of the company' within the meaning of Section 35D of the Income Tax Act. It arises in the following circumstances :

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2. For the assessment year 1996-97, the assessee company declared an income of Rs.3,64,64,527/- which was subsequently revised to Rs.3,58,92,771/- and then to Rs.3,57,26,644/-. The return was eventually processed under Section 143(1B) of the Act at an amount of Rs.3,63,03,128/-. A notice under Section 143(2) was then issued to the assessee in response to which the assessee appeared to justify its claim for a preliminary expense of Rs.7,03,306/- under Section 35D of the Act being 2.5% of the 'capital employed in the business of the company'. It was inter alia argued by the assessee that it had issued shares on a premium which premium was according to the assessee, a part of the capital employed in the business of the Company. The Assessing Officer did not think so. He was of the view that the expression 'capital employed in the business of the Company' did not include the premium received on share capital, as contended by the assessee. He accordingly calculated the allowable deduction under Section 35D at Rs.1,95,049/- only, disallowing and adding back the rest of the amount claimed to be taxable income of the assessee.

3. Aggrieved by the above order, the assessee filed an appeal before the Commissioner of Income Tax who took the view that since 'the capital employed' consists of subscribed

capital, debentures and long term borrowings, any premium collected by the company on the shares issued by it should also be included in the said expression as the same is also capital contributed by the share holders. The Commissioner was of the view that the share premium account which is shown as reserve in the balance sheet of the Company is in the nature of capital base of the Company so that deduction under Section 35D of the Act was admissible with reference to the said amount also. Disallowance of Rs.5,08,257/- was accordingly deleted and the appeal filed by the assessee allowed.

4. In a further appeal preferred by the revenue against the above order, the view taken by the Commissioner has been reversed. The Tribunal has held that the premium collected by the Company on the share capital was not tantamount to 'capital employed in the business of the company' within the meaning of Section 35D(3) of the Act. The present appeal, as already mentioned earlier, assails the correctness of the said view .

5. We have heard learned counsel for the parties and perused the record. Section 35D of the Income Tax Act regulates amortisation of certain preliminary expenses. The provision inter alia says that if an assessee being an Indian Company or a person incurs after the 31st March, 1990 any expenditure

specified in Sub-section 2 after the commencement of his business in connection with the extension of his industrial undertaking or in connection with the setting up of a new industrial unit, the assessee shall be allowed a deduction of an amount equal to 1/10th of such expenditure for each of the ten successive previous years beginning with the previous year in which the business commences or the extension of industrial undertaking is completed or the new industrial unit commences production or operation. Sub-section 2 enumerates the expenditure regarding which such amortisation can be claimed while sub-section 3 limits the aggregate amount of expenditure for purposes of computing the deduction allowable under sub-section 1 to Section 35D. Sub-section 3 with which we are concerned may at this stage, be extracted to the extent the same is relevant for our purposes :

> "Where the aggregate amount of the expenditure referred to in sub-section (2) exceeds an amount calculated at two and one-half per cent -
> (a) of the cost of the project, or
> (b) where the assessee is an Indian company, at the option of the company, of the capital employed in the business of the company, the excess shall be ignored for the purpose of computing the deduction allowable under sub-section (1) :
> [**Provided** that where the aggregate amount of expenditure referred to in sub-section (2) is incurred after the 31st day of March, 1998, the provisions of this sub-section shall have effect as if for the words "two and one-half per cent", the words "five per cent" had been substituted.]

6. A careful reading of the above would show that in the

case of an Indian company like the appellant, the aggregate amount of expenditure cannot exceed 2.5% of the capital employed in the business of the Company. The crucial question, therefore, is as to what is meant by capital employed in the business of the Company for it is the amount that represents such capital that would determine the upper limit to which the amount of allowable deduction can go. The expression has been given a clear and exhaustive definition in the explanation to sub-section 3. It reads :

> (b) "capital employed in the business of the company" means -
>
> (i) in a case referred to in clause (i) of sub-section (1), the aggregate of the issued share capital, debentures and long-term borrowings as on the last day of the previous year in which the business of the company commences;
>
> (ii)in a case referred to in clause (ii) of sub-section (1), the aggregate of the issued share capital, debentures and long-term borrowings as on the last day of the previous year in which the extension of the industrial undertaking is completed or, as the case may be, the new industrial unit commences production or operation, in so far as such capital, debentures and long-term borrowings have been issued or obtained in connection with the extension of the industrial undertaking or the setting up of the new industrial unit of the company;

7. The above clearly shows that capital employed in the business of the company is the aggregate of three distinct components, namely, share capital, debentures and long term borrowings as on the dates relevant under sub-clauses (i) and (ii) of Clause *(b)* of the explanation extracted above. The term 'long term borrowings' has been defined in clause *(c)* to the

explanation. It is nobody's case that the premium collected by the Company on the issue of shares was a long term borrowing either in fact or by a fiction of law. It is also nobody's case that the premium collected by the Company was anywhere near or akin to a debenture. What was all the same argued by the counsel for the appellant was that premium was a part of the share capital and had therefore to be reckoned as 'capital employed in the business of the company'. There is, in our view, no merit in that contention. The Tribunal has pointed out that the share capital of the Company as borne out by its audited accounts is limited to Rs.7,88,19,679/-. The company's accounts do not show the reserve and surplus of Rs.19,66,36,734/- as a part of its issued, subscribed and paid up capital. It is true that the surplus amount of Rs.19,66,36,734/- is taken as part of share holders fund but the same was not a part of the issued, subscribed and paid up capital of the Company. Explanation to Section 35D(3) of the Act does not include the reserve and surplus of the Company as a part of the capital employed in the business of the Company. If the intention was that any amount other than the share capital, debentures and long term borrowings of the Company ought to be treated as part of the capital employed in the business of the Company, the Parliament

would have suitably provided for the same. So long as that has not been done and so long as the capital employed in the business of the Company is restricted to the issued share capital, debentures and long-term borrowings, there is no room for holding that the premium, if any, collected by the Company on the issue of its share capital would also constitute a part of the capital employed in the business of the Company for purposes of deduction under Section 35D. The Tribunal was, in that view of the matter, perfectly justified in allowing the appeal filed by the Revenue and restoring the order passed by the Assessing Officer.

8. This appeal accordingly fails and is hereby dismissed but in the circumstances without any order as to costs.

T.S. THAKUR, J

SHIV NARAYAN DHINGRA, J

MAY 15 , 2005
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